

No. 20662

United States
COURT OF APPEALS
for the Ninth Circuit

JEDDELOH BROTHERS SWEED MILLS,
INC., et al.,

v.

Appellants,

COE MANUFACTURING COMPANY,
a Corporation,

Appellee,

COE MANUFACTURING COMPANY,
a Corporation,

Appellee and Cross-Appellant,

v.

JEDDELOH BROTHERS SWEED MILLS,
INC., et al.,

Appellants and Cross-Appellees.

*Appeal from the United States District Court for the
District of Oregon—Civil No. 9702 (Judge Solomon)*

REPLY BRIEF OF CROSS-APPELLANT AND APPELLEE

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SUBJECT INDEX

| | Page |
|--|------|
| Unitized Construction | 2 |
| Distance Between Infeed and Outfeed Rolls..... | 3 |
| Accused Apparatus Has Conveyor-Type Table..... | 5 |
| Damages | 7 |
| Conclusion | 7 |
| Certificate of Counsel | 7 |

INDEX OF CASES

| | |
|---|------|
| Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 366 U.S. 271..... | 6 |
| Hansen v. Colliver, 282 F.2d 66, 127 USPQ 32 (C.A. 9, 1960) | 3, 7 |

- (a) only when the apparatus includes "*three units*" (Def. Br. p. 2) an infeed end unit, a conveyor, and an outfeed end unit (Def. Br. pp. 13-14), and
- (b) only when the rolls are 13 or 14 feet apart (Def. Br. p. 4; pp. 14-15).

Jeddelohs argue their apparatus has a "unitized frame" (Def. Br. p. 6) and that the distance between their infeed and outfeed pinch rolls is "about $3\frac{1}{2}$ feet" (Def. Br. p. 5). We shall consider each of these arguments below.

"UNITIZED" CONSTRUCTION

The "unitized frame" construction is a distinction without a difference. Obviously the infeed roll section and the outfeed roll section must be securely fixed in relation to each other. In the Parker patent these are shown as fixed to the floor. Jeddelohs fix theirs to side plates. Mounting to the floor or to side plates does not change the method of operation in any way whatsoever.

Moreover, under no circumstances can the so-called conveyor-type table D shown in Parker be considered a unit separate and apart from the so-called discharge end unit E since the belts of the conveyor table encircle the bottom of the two outfeed pinch rolls, and obviously they function in cooperation with one another. This bottom pinch roll is as much a part of the so-called conveyor-type table D as it is of the


discharge end unit E. In both the Parker apparatus and the accused Jeddeloh apparatus the outfeed pinch rolls are a part of the floating tipple, the infeed end of which is pivoted and the outfeed end of which floats or is moved from deck to deck of the apparatus being fed.

THE DISTANCE BETWEEN INFEED AND OUTFEED PINCH ROLLS

Defendants correctly observe that nothing is said in the Parker patent as to the distance between the infeed and outfeed pinch rolls. Even if a distance were specified, the situation would be no different since it is well established that a patentee is not limited or restricted to the preferred embodiment shown in his patent. *Hansen v. Colliver*, 282 F.2d 66, 69, 127 USPQ 32 (C.A. 9, 1960).

Coe, in fact, built apparatus generally similar to the preferred embodiment shown in Figs. 1 to 8 with the infeed and outfeed pinch rolls spaced at various distances from 10' to 13' (DX 144, p. 13-14).

It is obvious that in either plaintiff's or defendants' apparatus the greater the distance between the infeed and outfeed pinch rolls the less will be the inclination of the floating tipple or table and the flexing of the veneer during feeding. The less the veneer is flexed the greater are the chances that it will not be broken, etc. during the feeding operation. There is merit, therefore, in having the distance between the infeed and the outfeed pinch rolls substantial.

Obvious also is the fact that by fixing the height of the infeed rolls at approximately the midpoint that the maximum inclination of the tipple or table will be less than in the embodiment illustrated in Figs. 1-8 of Parker and the spacing between the infeed and out-feed rolls may be lessened. But this is merely an advantage flowing naturally from the modified construction suggested by Parker in his patent of fixing "the vertically movable assembly of the feed end unit  at some convenient height" (Tr. Vol. II, p. 344, col. 9, ll. 10-12) and adopted by defendants.

Beginning at page 8 of their brief, Jeddellohs quote testimony of their expert witness to the effect that the Parker apparatus as shown in the patent would not work if the distance between the infeed and the out-feed pinch rolls was shortened to approximately that employed in the Jeddelloh apparatus. This testimony was pure speculation on the part of the witness and no evidence was offered to prove the assertion. The witness certainly was not qualified as an expert on the behaviour of veneer:

"Q. Do you know anything about the angle of tolerance in the bending of veneer?

A. Well, green veneer has got pretty good tolerance, I would say. I would not say exactly what it was. It would vary species to species and thickness.

Q. You have never made any study of it to determine when damage is done to the veneer as a result of bending?

A. No, I have not.

Q. Nor at what angle?

A. No, I have not made any specific studies.

Q. You have had no experience whatsoever in the plywood industry, have you?

A. I have had some experience with glues used in the plywood industry.

Q. In the development of glues?

A. Yes, sir; adhesives." (Tr. Vol. I, p. 214)

ACCUSED APPARATUS HAS CONVEYOR-TYPE TABLE OR ITS EQUIVALENT

Defendants try to make some point of the fact that in their apparatus the infeed and outfeed rolls tilt with what they refer to in their Jeddelloh patent, No. 2,876,-009, as the loading conveyor mechanism. This construction results in the nip of the rolls always being in alignment, but the opposing rolls still function only to propel the veneer through the apparatus and the fact is that a table is positioned between the rolls to assure that the veneer will travel from the infeed to the outfeed rolls. Despite assertions that the feeder will operate without a table no operating machine is without one (Tr. Vol I, p. 119).

While minor differences in construction may appear, defendants do not show where any difference in function or operation of the two machines exists. They both function to feed veneer from a stack to the various decks of the dryer. In both, the infeed rolls are automatically opened to receive a load or charge of veneer and subsequently automatically closed to grasp the veneer and pull it from a stack. Operator controlled means are provided in both to keep the top of the stacks be-

ing fed and the infeed rolls in alignment. In both, the outfeed rolls to which the veneer is fed by the infeed rolls are automatically indexed past the decks of the dryer so as to cause the veneer to be loaded in the desired sequence into the various decks. In both, a table is positioned between the infeed and the outfeed rolls to assure travel of veneer between them. The end result of the operation of both machines is exactly the same and it is accomplished in essentially the same way by substantially the same means—with both veneer is fed to the decks of the dryer substantially, continuously and uniformly.

There has been no ambivalence on the part of plaintiff as to the function of defendants' table. The conveyor-type table D of plaintiff's illustrated embodiment operates to direct and support veneer from the infeed and outfeed rolls. This was an inherent function. Defendants' table 51 does no more and no less. No resort to the word "guide" is necessary to find equivalence. The portion of plaintiff's argument quoted on page 21 of the defendants' brief fortifies this fact.

Any differences between the accused apparatus and that of the Parker patent are inconsequential. As stated by Justice Jackson in *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 366 U.S. 271, "outright and forthright duplication is a dull and very rare type of infringement." Minor variations are found as is to be expected "to conceal and shelter the piracy."

Defendants' apparatus performs substantially the same function in substantially the same way to obtain

the same result making the doctrine of equivalents applicable. *Hansen v. Colliver, et al*, 282 F.2d 66, 127 USPQ 32 (C.A. 9, 1960).

DAMAGES

The matter of damages is believed to be adequately covered in Appellee-Cross-Appellant's prior briefs.

CONCLUSION

The decision of the trial court should be affirmed or modified in the respects enumerated in Appellee-Cross-Appellant's opening brief.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

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